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SUPREME COURT, U.S.
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No. 493

In the Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SANDERS BROTHERS RADIO STATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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I

Respondent contends that the Commission has no standing to raise the questions argued at bar because its motion to dismiss in the court below was predicated solely on the alleged untimeliness of the appeal (see brief, pp. 16–19, 37–39). The contention is without merit. Insofar as the Commission urges reversal of the decision below on the ground that respondent had no standing to appeal under Section 402 (b) (2) of the Act, it is raising a jurisdictional question. Such a question may be raised at any time and, even if not raised by the

parties, may be decided by the Court *sua sponte*. *United States* v. *Corrick*, 298 U. S. 435, 440; *United States* v. *Griffin*, 303 U. S. 226. Insofar as reversal of the decision below is urged on the ground that the Commission was not obligated to make findings with respect to the competitive effect of the new station upon respondent, petitioner is not raising a new issue but simply asking this Court to review the question decided by the court below (R. 471–475).

II

Respondent entirely fails to meet the argument advanced in Point I of our main brief that the Commission, in passing upon an application for a license for a new station, is under no duty to protect existing licensees from competition. Instead, it advances the view, which we do not contest, that under the provisions of Sections 308 (b) and 319 (a) the Commission must consider the financial ability of the applicant to render the proposed service and therefore must consider the effect, if any, of the competitive situation upon *the applicant's* financial qualifications.

It is important to understand the difference between these two arguments. Quite obviously, the Commission is and must be concerned with the financial qualifications of an applicant for a license; it would be just as much in violation of the statute to assign one of the limited number of radio frequencies to a person financially unable to make use of it as it would be to assign a frequency to a person

technically or legally unqualified to use it.[1] Consequently, if, after one license has been granted, another person files an application for a license, his application should be denied if he is financially unable to sustain the proposed operation because of the effect of competition from the existing station, or for any other reason. But if the new applicant shows that he is financially able to render the service proposed, then the application should be granted even though the community may be able to support only one station. The fact that granting the new license may impair the ability of the existing licensee to render service in the public interest, or may even drive him out of business entirely, is immaterial; the new station will have this effect, as we pointed out in our main brief (pp. 30–32), only if it renders superior service. Therefore, the public interest, which is the touchstone of all Commission action, will be advanced rather than impaired by the granting of the new license, irrespective of the effect upon the existing licensee. The better the new station is, the greater will be its adverse effect upon the existing station, and the greater will be its beneficial effect upon the public interest.

Respondent's confusion arises from the fact that it reads into the Commission's duty to deny a license to an applicant who is not financially qualified

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[1] Similarly the Commission must consider the financial qualifications of an applicant for the renewal of a license. See our main brief, pages 32–33.

a duty to maintain the financial integrity of persons whose applications have been granted. This is a *non sequitur*. It is clearly in the public interest to license only those financially qualified, but it is not in the public interest to maintain the financial integrity of a licensee at the expense of depriving the public of the service of another financially qualified licensee who can impair the ability of the first licensee to render service only by himself rendering a superior service.

The requirement of Sections 308 (b) and 319 (a) that the Commission consider the financial qualifications of the applicant, like the cognate requirement that it consider his citizenship, character, and technical ability, is designed for the protection of the public and not for the protection of existing licensees. Therefore, while the financial ability of the applicant itself is a relevant consideration in determining whether the application is in the public interest, once it has been established that the applicant is financially qualified, the effect of his proposed operation upon existing stations is entirely immaterial.

III

In our main brief we pointed out that respondent has no right to freedom from competition either as a licensee authorized to use radio transmitting equipment or as a person engaged in furnishing an advertising medium (Br. 41). Respondent seeks to avoid the force of the arguments presented by urging that the legal injury of which

it complains is a "loss of listeners" (Br. 45). Its contention necessarily assumes that the Act confers on the licensee of a broadcast station a substantive right to protection from competition from any other broadcast station, whether commercially operated or not, which might succeed in inducing part of the listening public to tune in on its programs. The Act can be searched in vain for any indication that the grant of a license confers any such substantive right. To the contrary, as pointed out in our main brief (pp. 18–34), the underlying policy of the Act is that competition for listeners shall be fostered in order to insure high quality programs and that the limited number of radio frequencies shall be utilized to the utmost in order that the listening public may have the widest possible choice of programs. It can scarcely be contended that it is against the public interest for the people of Dubuque to have another radio station to whose programs they can listen or that Congress intended to give respondent a right to protest the action of the Commission because it will have this result. If, in the future, fewer persons will listen to respondent's programs, it will be because part, at least, of the listening public prefers the programs presented by Telegraph-Herald. Respondent can certainly have no claim of right under the Act to protection from loss of listeners occasioned by its own inability to render a program service attractive enough to retain them.

IV

In our main brief (p. 34) we asserted that neither the Federal Communications Commission, the Federal Radio Commission, nor the Secretary of Commerce had ever denied a license to one otherwise qualified on the ground that his competition may injuriously affect an existing licensee. Respondent states (Br. 32–36) that this assertion is contrary to fact and points particularly to four decisions of the Commission which are allegedly inconsistent with the statement made by us. In three of these cases (*In re Genesee Radio Corporation*, 5 F. C. C. 183, 187; *In re R. R. Jackman*, 5 F. C. C. 496, 500; *In re The Louisville Times Company*, 5 F. C. C. 554, 559), the Commission's denial of the application was based upon the fact that the applicant was already a licensee of an existing station covering the same area as that covered by the station sought to be licensed. An additional station licensed to the holder of a license of a station already serving the community would not create additional competition, but would tend toward monopolization. It was for this reason that the applications for the second station were denied.

The opinion of the Commission in *In re Fall River Herald News Publishing Co.*, 5 F. C. C. 377, 381, 382, cited by respondent at page 33 of its brief and at pages 85–89 of the appendix thereto, does contain dicta concerning the effect which might

result to an existing station by the addition of a second station in Fall River, but it is perfectly apparent from the decision in its entirety that this was not the reason for the denial of the application. On page 88 of the appendix to respondent's brief asterisks are used to denote the omission of certain findings, and on page 89 asterisks are used in lieu of the fourth conclusion supporting the Commission's action. Reference to the complete decision will show that there were pending before the Commission at the time of its action on the Fall River application two other applications requesting the same frequency for a station in two other communities not then having radio stations. The important consideration in denying the application for the second station in Fall River was the fact that the granting of the application would preclude the establishment of a station in either of these other two communities. The Commission's refusal was not designed to protect the existing station but to provide a fair and equitable distribution of radio facilities in the public interest.[2] See Section 307 (b).

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[2] On the same day that the Commission denied the application to establish the second station in Fall River, Massachusetts, on 1210 kc., the Commission granted an application to establish a station in Barnstable, Massachusetts, on that frequency. *In re Cape Cod Broadcasting Co.*, 5 F. C. C. 430. The Barnstable application is one of those mentioned in the *Fall River* decision as being in conflict with the Fall River application. 5 F. C. C. 430, 437–439.

Respondent makes reference to the factual situation in *Fly* v. *Heitmeyer*, No. 316, present Term, decided January 29, 1940, and asserts that the Commission's desire to hold a further hearing on the Heitmeyer application evidences a policy directly in conflict with that taken in the instant case. The only question involved in the *Heitmeyer* case was the authority of the Commission to take further evidence on an application after the court below had reversed a decision of the Commission denying such application. The purpose of the hearing was to ascertain the qualifications of Heitmeyer as a proposed licensee. At no time either before the Commission or in the courts was it ever intimated that the purpose of the Commission in taking further evidence to determine the qualifications of Heitmeyer to construct and operate a station in Cheyenne, Wyoming, was to protect an existing licensee from economic injury. As a matter of fact, there is no existing licensee in Cheyenne.

V

In urging that it is a "person aggrieved or whose interests are adversely affected" within the meaning of Section 402 (b) (2), respondent relies heavily on (1) the legislative history of the section, (2) the practice of the Commission in allowing interventions in proceedings before it, (3) the language of Section 405 relating to petitions for rehearing before the Commission and (4) the

language of Section 402 (d) relating to interventions in appeals taken under Section 402 (b) (2). None of the considerations adverted to support respondent's argument.

1. The discussion in respondent's brief and in the appendix to its brief of the legislative history of Section 402 (b) (2) is incomplete and for the most part irrelevant. Section 402 (b) (2) is a reenactment of Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930 (c. 788, 46 Stat. 844). As originally enacted, Section 16 of the Radio Act of 1927 gave no right of appeal from the granting of a license by the Commission but made the court below a superior administrative body to review denials of licenses by the Commission. An appeal from the granting of a license was first provided for by the 1930 amendment to Section 16 and Section 16 as thus amended was reenacted as Section 402 (b) (2) of the Communications Act of 1934.

In the so-called legislative history contained in the appendix to its brief, respondent has an extended discussion of bills which were never enacted into law and of statements made concerning those bills. Nowhere in its discussion does respondent refer to the reports of the House Committee on Merchant Marine and Fisheries and of the Senate Committee on Interstate Commerce on H. R. 12599 which was enacted as the Act of July 1, 1930. The report of the House Committee, after setting forth

the original Section 16 and the proposed new Section 16, added only the following two paragraphs (H. Rept. No. 1665, 71st Cong., 2d Sess., p. 2):

> The purpose of the amendment is to clarify the procedure on appeal to the court from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decision of the Court of Appeals of the District of Columbia by the Supreme Court.
>
> This amendment was part of H. R. 11635, which unanimously passed in the House on April 30, 1930. Because of the urgent need of this legislation and the probability that consideration of H. R. 11635 will not be reached in the Senate, the amendment is offered as a separate bill.

The Senate Committee in its report adopted as its own views the views expressed in the House Report (S. Rept. No. 1105, 71st Cong., 2d Sess.).

The debates on the bill in Congress centered around the fact that under the amendment the court below would no longer be a superior and revising agency in the administrative field but an appellate tribunal exercising judicial functions, so that its decisions could be reviewed by this Court. See 72 Cong. Rec. 11529, 11530, 11882; *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 276. There is nothing whatever in the debates, as there

is nothing in the reports of the Congressional committees, which indicates that Congress intended by the amendment to confer legal rights upon persons not already possessing them or to make a remedy by way of appeal available to persons whose legal rights are not invaded by the administrative action sought to be reviewed.

2. There is similarly nothing in the administrative practice of the Commission with respect to intervention in proceedings before it which lends support to the contention that respondent is a "person aggrieved or whose interests are adversely affected" within the meaning of Section 402 (b) (2). There is no provision in the statute giving any right of intervention in Commission proceedings; indeed, the only requirement of a hearing before the Commission is contained in Section 309 (a) which provides that if the Commission, upon examination of an application, does not determine that the public interest, convenience, or necessity will be served by granting the application; the Commission "shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, *and shall afford such applicant an opportunity to be heard* under such rules and regulations as it may prescribe." [Italics supplied.]

However, under the provision of Section 4 (j) that "The Commission may conduct its proceedings in such manner as will best conduce to the

proper dispatch of business and to the ends of justice," the Commission, like many other administrative agencies, has adopted a liberal policy of allowing intervention by any persons who allege that they have a substantial interest in the proceeding, whether or not they have such an interest as would be cognizable in a court of law.[3] Chambers of commerce, states, and all types of persons and organizations having an interest in the proceedings have been allowed to intervene. Consonant with this liberal policy, the Commission has always considered a licensee of an existing station, who might suffer financial damage as a result of competition from a new station, as having an interest in the outcome of the proceeding sufficient to warrant his intervention. The Commission's former practice was to permit intervention by such persons almost at will on the theory that their participation in the proceedings would assist the Commission in determining the issues presented by the new application. More recently the Commission's policy has been changed, not with respect to such persons alone but with respect to all persons desiring to intervene in Commission proceedings,

[3] The Commission's past and present rules with respect to intervention are found in the appendix to respondent's brief at pp. 73–76.

so as to require a showing that their participation in the proceedings will be in the public interest.[4]

But there is nothing in either the past or present procedure of the Commission with respect to intervention which throws any light on the question of who may appeal under Section 402 (b) (2) from an order of the Commission granting an application. A chamber of commerce, or a state, may have sufficient interest in the application to be heard before the Commission, but this certainly does not mean that they can appeal under Section 402 (b) (2). Similarly, the fact that an existing licensee may have sufficient interest for intervention does not mean that he has a legal right or interest which is subject to judicial cognizance. The decisions of this Court in *Sprunt & Son* v. *United States*, 281 U. S. 249; *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U. S. 479; and *Moffat Tunnel League* v. *United States*, 289 U. S. 113, demonstrate that an interest which may be recognized by an administrative agency as entitling a person to intervene in the proceedings before it is not necessarily such an interest as entitles the person to

[4] For a discussion of the Commission's past and present practice with respect to permitting intervention, the Court is referred to the opinion of Commissioner Payne on a petition to intervene and enlarge issues in the case of *In re Hazelwood, Inc.*, Docket 5698, printed as an appendix to this brief.

invoke the jurisdiction of the courts to test the validity of the administrative action.

3. Respondent points to the fact that Section 405 of the Act, relating to petitions for rehearing before the Commission, provides that such petitions may be filed by "any person aggrieved or whose interests are adversely affected," and suggests that it is unreasonable to assume that Congress intended to confine petitions for rehearings to those whose legal rights or interests are invaded by the Commission's action. There is no necessity to indulge in the assumption, since Section 405 also permits a petition for rehearing to be filed by "any party"—i. e., by any person who has intervened in the administrative proceeding. It is entirely reasonable to assume that Congress did not intend to allow a petition for rehearing to be filed by any person who was not a party to the proceedings in which the decision was made unless such person has a legal right cognizable in court.

4. Respondent also points to Section 402 (d) of the Act which provides that in appeals taken under Section 402 (b) any person "who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of" may intervene in the appeal. Petitioner suggests that intervention under this section cannot be limited to those seeking to protect legal rights or interests, but

states no reason why this should not be so. In our view, the section means simply that any person may intervene who could have appealed from the decision of the Commission had it gone the other way. The application of the section is illustrated by the intervention in the court below of the Telegraph Herald which would clearly have had a right to appeal had the Commission denied its application for a license.

VI

Respondent urges in Point IV of its brief that the failure of the Commission to serve it with various memoranda or reports on the case, prepared by the Engineering, Law and Examining Departments of the Commission, deprived respondent of a fair hearing and asks that the judgment of the court below be modified to include instructions to the Commission to disclose the contents of these memoranda. Respondent raised this point in the court below by a motion suggesting a diminution of the record. In reply to the motion, the Commission certified that the reports referred to "do not themselves constitute evidence in the record nor were they so considered by the Commission in making its decision." (R. 476.) The court below sustained the Commission on this point, stating (R. 476–477):

> * * * appellant's assertion—upon information and belief—of improper action

upon the part of the Commission is entirely unsupported by the record and is contradicted by appellee's positive denial heretofore noted. In its brief, on this appeal, the Commission described the files which it keeps in connection with applications filed with it and said: "neither these files nor the contents thereof are used as evidence in any case after it is designated for hearing except as the contents of the technical or legal recommendations may be incorporated into the record by the testimony of witnesses under oath and subject to cross-examination." Under the circumstances the presumption of regularity of official conduct is controlling.

Moreover, even if the court below had erred in denying respondent's motion, respondent could not be heard to contest this ruling on the record in this Court. Respondent urges the point not as an additional ground for sustaining the judgment below but as the basis of modifying the judgment rendered in his favor. If respondent was dissatisfied with the relief decreed by the court below or if it believed that it was entitled to additional relief, it should have raised this question by means of a cross-petition for certiorari. Having failed to file such a cross-petition, it cannot now secure modification of the decree in its favor. *Hubbard* v. *Tod*, 171 U. S. 474; *Federal Trade Commission* v. *Pacific Paper Association*, 273 U. S. 52; *Lucas* v. *Alexander*, 279 U. S. 573.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

RICHARD H. DEMUTH,
Special Attorney.

WILLIAM J. DEMPSEY,
General Counsel,
WILLIAM C. KOPLOVITZ,
Assistant General Counsel,
ROBERT M. COOPER,
Assistant to the General Counsel,
BENEDICT P. COTTONE,
HARRY M. PLOTKIN,
Counsel,
Federal Communications Commission.

FEBRUARY 1940.

APPENDIX

36567

OCTOBER 2, 1939.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

In re Application of Hazelwood, Inc. (New), Orlando, Florida, for Construction Permit to Erect a Radiobroadcast Station to Operate on 1390 kc., With 1 kw. Power, Unlimited Time. Docket No. 5698

DECISION ON PETITION TO INTERVENE AND REQUEST FOR ENLARGEMENT OF THE ISSUES

PAYNE, Commissioner (Presiding at Motions Docket)

This petition was filed by the Orlando Broadcasting Company, Inc., licensee of Radio Station WDBO, Orlando, Florida, and requests leave to intervene in the hearing designated by the Commission on the above-entitled application and further requests that the issues heretofore designated by the Commission to be heard at said hearing be enlarged to include the following: (a) to determine the extent of the broadcast service already rendered in the Orlando area; (b) to determine if the interests of Station WDBO will be adversely affected by a grant of the above-entitled application; and (c) to determine whether the operations of the sta-

tion proposed by the applicant will be in accord with the Commission's plan of allocation and standards of good engineering practice.

Petitioner requests that it be made a party in the proceedings on the application of Hazelwood, Inc., and that it be allowed to present evidence on the issues listed in the Notice of Hearing heretofore published by the Commission as well as upon the additional issues requested to be added and any further issues which may be added hereafter.

When the application of Hazelwood, Inc., was received by the Commission it was examined as required by Section 309 (a) of the Act, and because the Commission was unable upon such examination to reach the decision that the public interest, convenience, and necessity would be served by a grant of the application it was designated for hearing in order to afford the applicant an opportunity to be heard on the question of whether or not the application should be granted. The only issue specified by the Commission in the Notice of Hearing was that relating to the possibility of adverse effect upon the service rendered by Stations KLRA, WHK, and WMFJ by reason of electrical interference which might result from the operation of the proposed new station.

The instant petition to intervene and to enlarge the issues to include questions other than those specified in the Notice of Hearing requires an interpretation of the Commission's rule 1.102 which became effective on August 1, 1939. Because the questions raised by the instant petition are also involved in a number of other petitions now pending on the motions docket, I feel that it is appropriate to express in some detail my views con-

cerning the sufficiency of the instant petition in the light of the Commission's present rule governing intervention and enlargement of issues.

The Commission's rule relating to intervention and enlargement of issues, reads as follows:

> SEC. 1.102 . *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed or verified in accordance with Sec. 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

In applying this rule to the instant petition I will deal with the request to intervene, and the request to enlarge issues separately.

PETITIONER'S REQUEST TO INTERVENE

The underlying purpose of the Commission in adopting its present rule on intervention was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed "a substantial interest in the subject matter." This standard was so broad and the Commission's practice under it

was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues, and pile up costs to the applicant and to the Commission through the introduction of cumulative evidence, unnecessary cross-examination, dilatory motions, requests for oral argument, and other devices designed to prevent expeditious disposal of Commission business.

The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. The present rule requires a petitioner to set forth not only his interest in the proceeding but also "the facts on which the petitioner bases his claim that his intervention will be in the public interest." The fact that a proposed intervener may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application. Inter-

vention in proceedings before administrative agencies like the Federal Communications Commission is ordinarily covered by statutory provision. The Communications Act contains no provisions giving the right of intervention in proceedings before the Commission to any person or class of persons, but expressly provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the public will benefit through aid or assistance given to the Commission or the applicant by a party-intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102.

The petition of the Orlando Broadcasting Company, Inc., utterly fails to meet the requirement of the present rule on intervention. Insofar as it requests permission to participate in the hearing already designated on the application of Hazelwood, Inc., it simply prays that the petitioner be made a party and be allowed to present "evidence." Not the slightest intimation is given as to the type of evidence which the petitioner desires to adduce or what petitioner intends to prove by the introduction of such evidence. The only issue mentioned in the Commission's Notice of Hearing is the issue of

electrical interference to Stations KLRA, WHK, and WMFJ, which are now operating either on 1390 kc. (the frequency requested by Hazelwood, Inc.) or on adjacent frequency. The petitioner operates its station on 580 kc.; so there could be no electrical interference to petitioner's station, and while it would not be impossible for the petitioner to obtain data on the issue specified in the Commission's Notice of Hearing, it is not likely that the petitioner is as well informed or is as well-equipped to adduce testimony concerning the issue of electrical interference as is the Commission itself. Without a proper showing of the type of evidence proposed to be adduced and the facts expected to be proved thereby, the Commission would not be justified in permitting the petitioner to intervene in the proceedings on the application of the Hazelwood, Incorporated.

On the basis of the allegations now set forth in the instant petition the request for intervention must be denied insofar as it requests permission to participate in the hearing on the issue already designated. Insofar as the petition requests permission to adduce evidence pertaining to the issues which it requests the Commission to add to the Notice of Hearing, it is necessarily contingent upon the action which is taken on the request to enlarge issues. For reasons stated below, this request must also be denied. Hence, the request to intervene in order to adduce evidence relating to these issues must be denied not only for the reasons above stated but also because the request to enlarge issues is denied.

The determination of what issues an applicant for broadcast facilities should be required to meet in a hearing on his application is a matter committed by Congress to the discretion of the Commission. No hearing whatever is required if the Commission is able upon an examination of an application to determine that the public interest, convenience, and necessity will be served by granting the application. If the Commission is not able to reach such a determination upon the examination of an application the statute requires that notice and an opportunity to be heard shall be given the applicant, but not otherwise.

Good administration, both from the theoretical and practical standpoint, requires that unduly long and expensive hearings should be avoided. Therefore, the Commission should not burden itself or the applicant by the injection in a hearing of issues concerning which the Commission has already satisfied itself. Furthermore, if in a particular case it appears that a hearing on a particular issue would be expensive and time consuming, while a hearing on another issue, which might finally dispose of the application, would be relatively inexpensive and expeditious, the Commission as a matter of administrative convenience should set down the application for hearing only on the latter issue.

In the instant case the Commission was unable to find that the public interest, convenience, and necessity would be served by granting the application of Hazelwood, Inc., because of the possibility of interference with the service now rendered by three other stations. If at the hearing on its appli-

cation the applicant is unable to sustain the burden with respect to this issue, the Commission will enter an order denying the application, which will completely dispose of the proceedings. In such event it would have been wholly unnecessary and wasteful of both time and money for the Commission to have ordered a hearing not only upon the issue of electrical interference but also upon other issues which might also have constituted a basis for denying the application.

It is incumbent upon any person requesting the injection of new issues in a hearing to show not only that the issues which he proposes to have the Commission add are proper matters for the Commission to consider, and that there is a basis for believing that the Commission will be required to deny the application on the new grounds alleged, but also that the proposed new issues should be heard at the hearing already set rather than at a later time. Certainly, if the issues specified by the Commission in a Notice of Hearing are in themselves a sufficient basis for denying an application if the applicant fails to sustain its burden of proof, no third person is harmed because the Commission does not also include in the hearing other and different issues, even though conceivably it may be necessary at some later time for the Commission to designate the application for further hearing if the applicant meets its burden on the issues already specified. The instant petition to enlarge issues merely states that the three issues requested for inclusion in the hearing are proper issues for the Commission to consider before acting upon the application of Hazelwood, Inc. Assuming for the purpose of this opinion but not conceding that the

three issues proposed to be included in the hearing are proper for the Commission to consider, petitioner has utterly failed to show that the insertion of these additional three issues in the hearing at this time on the application of Hazelwood, Incorporated, would expedite the disposition of this application and not merely result in a more costly, drawn-out, and complicated record, with no attendant advantages to the Commission or to the public.

For the foregoing reasons, the petition to enlarge issues is denied.

By order of George Henry Payne, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE,

(T. J. Slowie)

Secretary.

Dated SEPTEMBER 29th, 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1940